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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 620

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLEE'S STATEMENT OPPOSING JURISDICTION.

Pursuant to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States, Appellee filed this statement opposing jurisdiction.

Nature of the Case.

This is an appeal by the International Harvester Company from a judgment of the Supreme Court of the State of Wisconsin affirming an assessment against the Appellant of taxes for the period September 26, 1935 to October 15, 1937, both inclusive, imposed by the provisions of the Wisconsin Tax Law, commonly referred to as the Wiscon-

sin Privilege Dividend Tax Law, which was enacted by Laws of Wis. 1935, Ch. 505, Sec. 33, as amended by Laws of Wis. 1935, Ch. 552, and by subsequent legislative acts extended so that ever since it has been and now is presently operative.

The case was decided June 16, 1943 and is reported *International Harvester Company* v. *Department of Taxation*, (1943) 243 Wis. 198, 10 N. W. (2) 169, and motion for rehearing was denied September 14, 1943 (which has not as yet been reported, except in 11 N. W. (2) 95 (Adv. Sh., No. 3, October 27, 1943).

This appeal, and the decision of the Supreme Court of the State of Wisconsin from which it is taken, are an aftermath of the previous litigation in this Court in 1940 in which the Appellant in a present companion appeal, *Minnesota Mining & Mfg. Co.* v. *Wisconsin Department of Taxation*, was involved. In January, 1940 the Supreme Court of the State of Wisconsin had before it the constitutionality of the Wisconsin Privilege Dividend Tax Law, which the Appellant here challenges. In three companion cases, *J. C. Penney Co.* v. *Tax Comm.*, (1940) 233 Wis. 286, 289 N. W. 677; *F. W. Woolworth Company* v. *Tax Comm.*, (1940) 233 Wis. 305, 289 N. W. 685; and *Minnesota Mining & Manufacturing Company* v. *Tax Comm.*, (1940) 233 Wis. 307, 289 N. W. 686; that Court in an opinion in the *J. C. Penney Co.* case, which was made applicable to and the basis of the disposition of the other two cases, felt that *Connecticut General Life Ins. Co.* v. *Johnson*, (1938) 303 U. S. 77, 58 S. Ct. 436, 82 L. Ed. 673, required that it hold this Wisconsin Tax Law invalid and therefore did so. Upon certiorari in all three cases this Court, in an opinion rendered December 16, 1940 in the case involving the J. C. Penney Co. and made applicable to the other two cases, reversed the Supreme Court of Wisconsin and remanded the cases for the determination of such questions as were

open in light of this Court's opinion. *State of Wisconsin* v. *J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267; *State of Wisconsin* v. *Minnesota Mining & Manufacturing Co.*, (1940) 311 U. S. 452, 61 S. Ct. 253, 85 L. Ed. 274; *State of Wisconsin* v. *F. W. Woolworth Co.*, (1940) 311 U. S. 622, 61 S. Ct. 395, 85 L. Ed. 395. The basis of this Court's reversal was a determination that the imposition of this tax is within the taxing jurisdiction of the State of Wisconsin. The taxes of the Appellant, Minnesota Mining & Manufacturing Co. in the companion appeal here at the same time as this case, that were involved in that case were the taxes assessed against it in respect to dividends paid during the year 1936, which taxes are likewise the taxes of one of the years involved in the present appeal.

Upon remand the cases were again heard, but the Supreme Court of the State of Wisconsin refused to reconsider the constitutionality of the statute, being bound by the decision of this Court, but did address itself to the matter of computation of the tax. It held that the tax had not been properly computed and remanded the cases for computation thereof in accordance with its opinion.

In those cases the taxes had been computed following the provision of the statute that in the absence of proof to the contrary dividends paid shall be presumed to have been paid out of earnings of the corporation of the year immediately preceding the payment of the dividend. The method of computation there used took the previous year's income of the corporation and ascertained the amount thereof attributable to Wisconsin by using the provisions of the Wisconsin Income Tax Law in Ch. 71, Wis. Stats., expressly made applicable. The percentage relationship was then applied to the dividend paid as determining the amount of Wisconsin income distributed by the dividend and the tax was then computed on that amount. As was

stated to this Court on the arguments of the cases above mentioned, if the dividends paid in a year exceeded the income of the corporation of the prior year, then such excess would be deemed paid out of the next previous year's income of the corporation and the percentage of Wisconsin income to the total income of such year would be applied to determine the amount of Wisconsin income of that year distributed by the dividend. This would be continued year by year until the total dividend payment would be accounted for and the tax applied to the amount of the dividend thereby attributed to Wisconsin income. On the remand the Wisconsin Supreme Court held that the presumption of the statute that the dividend is paid out of the prior year's earnings is rebuttable and that it being shown factually that the dividends were in fact paid out of surplus this rebutted the presumption. Accordingly it held the taxes were not properly computed and remanded the cases with directions to remand to the Commissioner of Taxation for further proceedings in accordance with the opinion. In the opinion, 238 Wis. 69, at 78, 79, the Court said:

> "* * * When the company drew upon this surplus for the payment of the dividend declared, it did not draw upon 1935 income but on its entire surplus. It must be presumed, however, that when it drew upon the surplus which contained Wisconsin income, it drew upon Wisconsin income to the extent of the proportion which Wisconsin income bore not to the income for the year 1935 but to the whole amount of the surplus. The Tax Commission treated the matter as if the statutory presumption were conclusive and gave no weight or consideration to the evidence. In this the Tax Commission was in error. It is said in briefs of counsel that it would be a Herculean task to compute the amount of surplus attributable to Wisconsin income. Inasmuch as the basis upon which the supreme court of the United States sustained the tax is that some

part of the dividend is allocable to Wisconsin income, we see no escape from the conclusion that no tax can be levied until that fact is ascertained."

Upon the return of the record the taxing authorities of the State of Wisconsin recomputed the taxes of the three taxpayer companies involved in said cases and gave to each of them a notice of the assessment thereof. As before stated, because the tax of the Appellant Minnesota Mining & Manufacturing Company that was there involved was only in respect to taxes on dividends paid in the year 1936, the recomputation and notice of assessment of the recomputed taxes included only the taxes for that year. However, as by that time the years 1937 to 1940 had passed and the Appellant Minnesota Mining & Manufacturing Company had paid dividends during those years, an assessment was made against it for taxes upon dividends paid in 1937 and another assessment for taxes upon dividends paid during the years 1938, 1939 and 1940, computing said taxes upon the basis set forth in the decision of the Supreme Court of Wisconsin on remand. This involved an analysis of the surplus of the taxpayer corporation as of the close of the year prior to the year in which the dividends were declared to ascertain the amount thereof which had been contributed by Wisconsin income and which represented Wisconsin income in said surplus. Having ascertained the percentage of relationship of Wisconsin income in surplus to the total thereof, that percentage was then applied to the dividends paid in the following year to arrive at the amount of said dividends that represented a distribution of Wisconsin income and the tax rate was then applied to that result. This was the method used also in the recomputation of the taxes against the J. C. Penney and F. W. Woolworth Companies. It is the method that has been used in all cases ever since the decision of the Supreme

Court of Wisconsin in the cases on remand. The Minnesota Mining & Mfg. Co. protested the assessment which was a recomputation of its 1936 taxes and also the new assessments for the subsequent years 1937 to 1940. The matters were successively heard as one case by the Wisconsin Board of Tax Appeals, the Circuit Court for Dane County, and the Supreme Court of Wisconsin. In a companion appeal to the instant appeal the Minnesota Mining & Mfg. Co. appeals to this Court from the decision by the Supreme Court of Wisconsin affirming said assessments, rendered on June 16, 1943, reported *Minnesota Mining & Manufacturing Co.* v. *Department of Taxation*, 243 Wis. 211, 10 N. W. (2) 174 and on September 14, 1943 denied a motion by the Appellant Minnesota Mining & Manufacturing Company for a rehearing thereon. Memorandum opinion on rehearing is not as yet reported, except in 11 N. W. (2) 96 (Adv. Sh., No. 3, October 27, 1943).

It is significant that at the same time that the Supreme Court was construing the case in which the present appeal is taken it also had before it four other cases involving various phases of this same Wisconsin Privilege Dividend Tax Law and that it rendered a decision therein on the same date as it rendered the decision in the instant case. These cases which were before that Court at that time comprised all of the attacks then being made before that court against this tax law. *Minnesota Mining & Manufacturing Co.* v. *Department of Taxation* (June 16, 1943), 243 Wis. 211, 10 N. W. (2) 174; rehearing denied September 13, 1943, but not reported except in 11 N. W. (2) 96 (Adv. Sh., No. 3, October 27, 1943). *Wisconsin Gas & Electric Co.* v. *Department of Taxation* (June 16, 1943), 243 Wis. 216, 10 N. W. (2) 140. *Blied* v. *Wisconsin Foundry & Machine Co.* (June 16, 1943), 243 Wis. 221, 10 N. W. (2) 142. *Montgomery Ward & Co.* v. *Department of Taxation* (June 16, 1943), 243 Wis. 224, 10 N. W. (2) 176.

Statutes Involved.

The Wisconsin Statutory Tax Law here involved is as set forth in the Appellant's statement as to jurisdiction under the heading: "The State Statute Involved", and in the interest of brevity will not be repeated. It is the same statute before this Court in the prior cases, except that by subsequent legislative enactments it has been extended from its original expiration date of July 1, 1937 so that it continuously has since been and is now presently operative up to and including July 1, 1945. In this connection it may be noted that the last extension of its operative effect to July 1, 1945 made by laws of Wisconsin, 1943, Ch. 367, sec. 2, changed the purpose of the statute and provides that the proceeds thereof

> "* * * shall be used to provide rehabilitation for returning veterans of World War II, construction and improvements of state institutions and other state property, and postwar public works projects to relieve postwar unemployment."

Facts.

The facts are as stated by the Supreme Court of Wisconsin:

> "Appellant is a New Jersey corporation, having its principal office in Hoboken, New Jersey. Its general executive offices are in Chicago. So far as the record discloses, it has done business in Wisconsin since 1920. The Wisconsin dividend privilege tax law was enacted and went into effect on September 26, 1935. From December 2, 1935, to October 15, 1937, appellant paid numerous dividends totaling $39,028,188.22, but did not pay any privilege dividend tax thereon. As of the end of the year 1934, the amount of surplus accumulated from Wisconsin earnings and constituting Wisconsin surplus on the basis of the formulae and method of computation prescribed by ch. 71, Stats., was $803,-

780.72. The amount attributable to Wisconsin as of December 31, 1935, was $2,227,499.03. The Wisconsin surplus as of October 31, 1936, was $2,608,908.26. On December 2, 1937, the Wisconsin Tax Commission, predecessor of Wisconsin Department of Taxation, notified appellant of an assessment of privilege dividend tax against it in the amount of $68,838.49, exclusive of penalties and interest, computation being based upon the statutory presumption that such dividends were paid out of previous years' earnings. Subsequently thereto, and because of the conceded rebuttal of the presumption, respondent recomputed the privilege divided tax at $53,713.29, exclusive of penalties and interest. There is a stipulation to the effect that, assuming the law to be valid and the method of computation authorized, the amount of the privilege tax as computed is correct. * * *"

No Substantial Federal Question Is Here Presented.

1. *Jurisdiction To Tax.*

(a) Authoritatively settled by *J. C. Penney Co. case.*

As previously pointed out this appeal involves the same statute and basically the same facts as in the prior cases, *State of Wisconsin* v. *J. C. Penney Co.* (1940), 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267; *State of Wisconsin* v. *Minnesota Mining & Mfg. Co.* (1940), 311 U. S. 452, 61 S. Ct. 253, 85 L. Ed. 274, and *State of Wisconsin* v. *F. W. Woolworth Co.* (1940), 311 U. S. 622, 61 S. Ct. 395, 85 L. Ed. 395. All of the arguments here made by Appellant were presented to this Court in those cases. So far as jurisdiction of the State of Wisconsin to impose the tax is concerned, there is no difference and it is submitted that these prior decisions completely preclude there being any substantial question and dispose of the matter conclusively.

(b) No conflict exists between the decisions of this Court and of the Supreme Court of Wisconsin.

By taking excerpts from the opinions and upon a basis of labels to be put on the tax, Appellant here endeavors to spell out that there is a conflict between the decisions of this Court and of the Supreme Court of Wisconsin and assert that this presents a substantial federal question as to jurisdiction to impose the tax. The best answer to any such contention is what the Supreme Court of Wisconsin said in its latest pronouncement on the subject in the opinion in this case, *International Harvester Co. v. Dept. of Taxation* (June 16, 1943), 243 Wis. 198, 10 N. W. (2) 169, in which a denial rehearing on September 14, 1943 has not as yet been reported except in 11 N. W. (2) 95 (Adv. Sh. No. 3, October 27, 1943).

That court was there presented with this same contention and said in that regard at 243 Wis. 198, 204-206; 10 N. W. (2) 169, 171 and 172:

> "Upon remand to determine such questions as were left open by the opinion of the United States supreme court, this court in *J. C. Penney Co. v. Tax Comm.* 238 Wis. 69, 298 N. W. 186, (1) insisted upon its exclusive power to construe the law; (2) held the law to be a privilege tax and not an income tax; (3) held that the determination of the United States supreme court settled all questions as to the jurisdiction of Wisconsin to levy the tax, whatever it be called; and (4) made certain directions as to its computation. The latter point need not be elaborated in this portion of the opinion. From the briefs in this case, and the memorandum of the trial court, it appears to be concluded that we have here what the trial court designates an 'immaculate dilemma;' that the supreme court of the United States has held this to be an income tax, and that as such it is invalid under the Wisconsin constitution; that the supreme court of Wisconsin, upon remand, has persisted in designating it a privilege tax in which case the privilege being wholly exercised out-

side of the state, it is unconstitutional under the federal constitution.

"We see no such dilemma. As we read the opinion of the United States supreme court, we discover no attempt by the court to usurp the function of this court so far as construing or labeling this tax is concerned. What the United States supreme court has done is (1) to state the factual basis upon which this law must be treated as constitutional in so far as the jurisdiction of Wisconsin to levy it is concerned, and (2) to hold that given the factual basis, the law is constitutional in this aspect, regardless of the designation given it by this court. In other words, the federal supreme court has established the jurisdictional fact which is that the corporation paid the dividends in whole or in part out of property located in this state or business transacted here. If the term 'jurisdictional fact' must hereafter be relegated to the limbo of outmoded terms, the basis of Wisconsin's power to tax is the fact that it has given its protection and the benefits of government to corporate activities in Wisconsin and that profits from these activities are traceable to the fund from which dividends are paid. So far as the constitutional aspects of the cases are concerned, the federal supreme court has reduced the privilege features of the tax to mere conditions or contingencies, upon the happening of which the tax accrues.

"This being true, we perceive no conflict so long as we are talking about the power of Wisconsin to tax as against the contention that the subject of the tax is beyond her borders, and hence, beyond her jurisdiction. It makes no difference what this court calls the tax. It may, for other than constitutional reasons, be important to designate the tax a privilege tax, but the label has no bearing upon the controversy here. We adhere to our determination upon remand of the *Penney Case*, *supra*, that this is a privilege tax and that we are bound to accept the mandate of the United States supreme court that its constitutional justifica-

tion from the standpoint of Wisconsin's power to tax is the fact of net earnings in Wisconsin traceable to the fund distributed by the dividend. Under the circumstances, we do not propose to re-examine contentions heretofore made and impliedly overruled that the law is void under the Wisconsin constitution. The constitutional question considered material and decided by this court in the original *Penney Case* involved the federal constitution and has been answered by the United States supreme court. We consider the matter to be closed."

(c) Method of computation of the tax is of no significance.

That the taxes are computed upon an analysis of surplus basis as directed by the Supreme Court of Wisconsin instead of by the prior method of deeming the dividends paid out of the most recent earnings of the corporation, is of no consequence. The method here used is the result of construction of the tax law by the Supreme Court of Wisconsin and has no relationship to any question of jurisdiction for it is used to determine the amount of income derived from Wisconsin that is distributed by the dividend. As said by both this Court and the Supreme Court of Wisconsin, the basis of the power to impose this tax is that the state has given its protection and the benefits of government to corporate activities in the state and that profits therefrom are distributed by the dividends paid.

In this connection Appellant here states, as it did before the Supreme Court of Wisconsin, that the Wisconsin Department of Taxation conceived the formula by which the tax is computed. Nothing could be more erroneous and the Supreme Court of Wisconsin at page 210 of its opinion in this case said:

"* * * The formula prescribed by this court upon remand in the *Penney Case*, supra, that is, that the

> Wisconsin earnings should constitute the numerator of a fraction of which the entire amount available for dividends is the denominator, is rational and workable and was applied in this case. * * *"

Likewise, Appellant here again, as it did before the Wisconsin Supreme Court unsuccessfully, urges that since the statute contains no specific formula for computing the tax, the Supreme Court cannot supply one.

It is submitted that these two last contentions are purely matters of construction of the Wisconsin statute, which this Court recognizes as being solely within the function and power of the Supreme Court of Wisconsin. We fail to see how the decision of the Supreme Court of Wisconsin against the Appellant on these two points could be said to present a federal question.

(d) Deductibility of the tax from the dividend remittance was before this Court in the prior cases.

Appellant makes reference to the recent decision of the Supreme Court of Wisconsin in the cases *Wisconsin Gas & Electric Co.* v. *Dept. of Taxation*, (June 16, 1943) 243 Wis. 216, 10 N. W. (2) 140 and *Blied* v. *Wisconsin Foundry & Machine Co.*, (June 16, 1943) 243 Wis. 221, 10 N. W. (2) 142. In the first case just mentioned it was held that a corporation is not entitled under the Wisconsin income tax law to deduct privilege dividend taxes imposed against and paid by it. The second case held a stockholder is not entitled to recover from the corporation the amount of privilege dividend tax withheld by the corporation in making remittance of the dividend, basing its decision on the specific requirements of the Wisconsin Privilege Dividend Tax Law that the tax shall be so deducted and holding such statutory provisions valid. In the *Wisconsin Gas & Electric Co.* case, the opinion unequivocally points out that when this Court

made its decisions in the prior cases the statute was before it and contained the provision which plainly puts the *burden* of the tax on the stockholder. But, that is not all, the provision was called to this Court's attention in those cases, and was made the basis of argument by the Respondents as establishing invalidity of the tax law.

2. *The Privilege Dividend Tax is not a retroactive tax.*

Appellant urges that, because the surplus is made up of accumulated income of past years, computation of the tax by analysis of the surplus to determine the amount in the surplus that is attributable to Wisconsin sources and applying the percentage relationship thereof to ascertain the amount of the dividend which paid out of income attributable to Wisconsin sources, renders it void as a retroactively taxing of income earned prior to the enactment of this tax law. This, obviously, is entirely inconsistent with Appellant's position that the tax is a transaction or privilege tax and that as the transaction or exercise of the privilege takes place outside of the state the law is invalid as taxing something beyond the jurisdictional limits of the state.

If the tax is not an income tax, and the Supreme Court of Wisconsin says it is not, but a privilege tax, then all that occurs is the measurement of the tax by the value of the privilege. In this connection it is most important that it be kept in mind that the tax is not imposed for the privilege alone of receiving dividends out of income derived from Wisconsin income nor alone for the privilege of declaring dividends therefrom, but for *both*. Most of the erroneous concepts in reference to this tax arise from a failure to notice or appreciate the significance thereof.

This tax is not a retroactive tax. It is a tax imposed upon and at the time of an occurrence,—namely, the dis-

tribution or devolution to stockholders of corporate earnings. It is a *present* tax imposed at the time of and on a *present* transfer or devolution. It imposes the tax in the year the dividend is paid and measures the tax by the amount of the dividend that is attributable to Wisconsin sources.

It is no more a retroactive tax than the taxation of a capital gain in the year of sale of the asset, when the profit or gain results from a sale at a price in excess of the cost when purchased years prior thereto. There the tax is imposed at the time of and measured by the value of the realization of profit. So here the tax is laid at the time of the realization by the stockholder of the fruits that have grown on the corporate tree and which is the realization upon the ultimate purpose he had in owning stock in the corporation and its conducting of business for profit. It is no more a retroactive tax than when an income tax is imposed upon a stockholder for corporate dividends received by him. The dividends if paid from surplus which is made up of accumulations of income of prior years effects a distribution of such accumulations and yet the tax is not deemed retroactive. The tax here is merely measured by the amount of Wisconsin earnings distributed and when they are utilized as such by way of dividend. For the purposes of the dividend such accumulations are still income or profit, for the corporation admittedly is not making a liquidating dividend but a regular dividend which is and must be a distribution of its profits. Even were the tax viewed as an income tax, which it is not, it would be taxing the corporation on the distribution of income and the stockholder on the receipt of income. Under Appellant's own argument that the tax is on the stockholder its argument would have to fall as to retroactivity for certainly then the analogy to the well recognized imposition of an income tax

on the stockholder on the dividend received would be complete.

From the foregoing it is submitted that the decision of the Supreme Court of Wisconsin is in accord with the decision of this Court and is so plainly right as not to require argument, and therefore no substantial federal question is presented.

Respectfully submitted,

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MOTION TO DISMISS APPEAL OR AFFIRM.

Comes now the Wisconsin Department of Taxation, Appellee herein, by its counsel below and moves this Court to dismiss, with costs, the appeal taken herein to this Court by International Harvester Company from the Judgment of the Supreme Court of the State of Wisconsin, dated June 16, 1943, upon the following grounds:

1. No substantial federal question is presented.

2. The decision of the Supreme Court of Wisconsin is so plainly right as not to require reargument.

In the alternative Appellee moves this Court to affirm on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Dated this 28th day of December, 1943.

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